Supreme Court, U. S.
JUL 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-1200

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROGER CRIST, ET AL., APPELLANTS

v.

MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Interest of the United States 1

Statement 2

Discussion 6

Conclusion 20

CITATIONS

Cases:

Ashe v. *Swenson*, 397 U.S. 436 19

Brown v. *Allen*, 344 U.S. 443 8

Brown v. *Ohio*, No. 75-6933, decided June 16, 1977 19

Downum v. *United States*, 372 U.S. 734 6

Francisco v. *Gathright*, 419 U.S. 59 8

Gori v. *United States*, 367 U.S. 364 13

Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U.S. 860 18

Illinois v. *Somerville*, 410 U.S. 458 ..... 5, 11, 17

I.T.S. Rubber Co. v. *Essex Rubber Co.*, 272 U.S. 429 8

Jeffers v. *United States*, No. 75-1805, decided June 16, 1977 ..... 12, 19

Lee v. *United States*, No. 76-5187, decided June 13, 1977 ..... 9, 10, 11, 13, 16, 17

Morales v. *New York*, 396 U.S. 102 9

Philbrook v. *Glodgett*, 421 U.S. 707 8

Picard v. *Connor*, 404 U.S. 270 8

Roberts v. *LaVallee*, 389 U.S. 40 8

Page

Cases—Continued

Roberts v. *United States*, 477 F. 2d 544 17

Scott v. *United States*, 202 F. 2d 354 18

Serfass v. *United States*, 420 U.S. 377 ..... 6, 14

State v. *Cunningham*, 535 P. 2d 186 ..... 4, 5, 7-8

United States v. *Dinitz*, 424 U.S. 600 ..... 16, 17, 18

United States v. *Gentile*, 525 F. 2d 252, certiorari denied, 425 U.S. 903 16

United States v. *Gordy*, 526 F. 2d 631 17

United States v. *Grasso*, 552 F. 2d 46, petition for a writ of certiorari pending, No. 76-1543 13

United States v. *Kehoe*, 516 F. 2d 78, certiorari denied, 424 U.S. 909 14

United States v. *Pappas*, 445 F. 2d 1194 18

United States v. *Phillips*, 431 F. 2d 949 17

Wainwright v. *Sykes*, No. 75-1578, decided June 23, 1977 14

Weinstein v. *Bradford*, 423 U.S. 147 20

Constitution and statutes:

United States Constitution:

Fifth Amendment:

Double Jeopardy Clause 1, 2, 4, 6, 7, 10, 13, 14, 19

Due Process Clause 7

Rev. Codes of Montana:

§ 94-1-103(3) (Supp. 1974) 3

§ 95-1505(b)(1969 Repl.) 11

§ 95-1702 (1969 Repl.) 14

Miscellaneous:

Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 Colum. J.L. & Soc. Probs. 295 (1976) 14-15

Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449 (1977) 7, 16

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, ET AL., APPELLANTS

v.

MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents two types of issues. We do not address the first—the time at which jeopardy attaches—because this Court's decision is not likely to affect the interests of the United States. If this Court holds that jeopardy attached in the state prosecution of appellees when the jury was sworn, the case then presents questions concerning the propriety of appellees' retrial following the dismissal of the first information. These raise a variety of legal issues important to the administration of the Double Jeopardy Clause: (1) whether a defendant may delay raising objections to the institution of the proceedings against him until jeopardy has attached, although the objections or arguments could have been made prior to trial, and still invoke double jeopardy as a bar to further prosecution when his motions lead to a premature termination of the first trial; (2) whether a defendant who has objected to a course of action that would prevent the termination of the first trial may then claim that the termination was not "manifestly

necessary" because the court could have pursued the course to which he objected; (3) whether a defendant who has an opportunity to do so must object to a pre-verdict termination of his trial in order to preserve a subsequent claim that the termination and ensuing retrial deprived him of his "valued right" to proceed to verdict before the first tribunal; and (4) whether the stage at which the first trial is terminated is material to the inquiry into the permissibility of a second trial under the Double Jeopardy Clause.

These questions, although central to the proper resolution of this aspect of the case, are very much lurking in the background, having received no consideration in the opinion of the court of appeals or in appellants' brief to this Court. Moreover, the record in this case appears to be inadequate to permit consideration of several of the issues. Because the questions presented by this facet of the case are likely to arise with some frequency in federal prosecutions, we believe it is important briefly to state our views.

STATEMENT

An information filed on October 31, 1974, charged appellees with nine Montana offenses growing out of transactions with the Industrial Accident Board of the State of Montana. Each count of the information charged a separate aspect of fraud or larceny; the preamble recited that these offenses took place between January 13, 1973, and February 19, 1974 (A. 1-11).

Jury selection began on March 10, 1975. On March 11, 1975, while the jurors were being selected, the prosecutor discovered that Count IX of the information might be defective in light of the recent revision of the criminal laws of Montana (II R. 20).[1] A complete revision of Montana

[1] "R." refers to the record in the court of appeals.

criminal laws became effective on January 1, 1974, and it applies only to offenses committed after that date; the old criminal laws continued to apply to prior offenses (Rev. Codes of Montana § 94-1-103(3) (Supp. 1974)). Since the criminal activity with which appellees were charged spanned the effective dates of the old and new statutes, it was particularly important that the charge be drawn with precision.

After the prosecutor recognized the potential defect in Count IX he communicated the problem to defense counsel and, in his words, "discovered that counsel for all * * * defendants had been aware of this issue prior to answering ready for trial and the commencement of jury selection, and had wilfully * * * withheld raising said issue planning to raise it at a point in the proceedings when jeopardy would be a bar to further prosecution" (II R. 20-21). The jury had not been sworn, however, and the prosecutor's motion to dismiss Count IX was granted on March 12, 1975.

The jury was sworn on March 13 (II R. 19). The defendants then filed a number of motions designed to preclude prosecution on several of the remaining counts. One of these motions, addressed to Count II, pointed out that the count charged an offense commencing on January 13, *1974*, and so could not be prosecuted under the old criminal statutes (see A. 3). The defendants asked the trial court "to restrict the state's evidence to the allegations of the information" (J.S. App. 16); this would, in practical effect, have prevented proof of the offense intended to be charged in Count II.

The trial court sent the jurors home and called for briefing on the many motions (II R. 21). The prosecutor filed the requested brief and also asked the trial court to permit the amendment of Count II to state that the offense commenced in 1973 rather than 1974. The court denied this

request (II R. 22). In response to the appellees' motions, however, which drew drafting defects to light, the state court *sua sponte* dismissed Counts II, VII, and VIII of the information (*ibid.*).

The prosecutor sought a writ of supervisory control from the Supreme Court of Montana, seeking to require the trial court to permit the amendment and to proceed with the trial. Because the jury was not sequestered, the prosecutor sought to hold these proceedings under seal, and the defendants objected. On April 2, 1975, the Supreme Court of Montana declined to accept the case (II R. 23; J.S. App. 17).

The prosecutor then moved to dismiss the remaining counts of the information in order to permit the State to refile a technically sufficient charge. The trial court granted this motion on April 4, 1975 (II R. 26), and a new information, dated April 4, was filed on April 7 (A. 12-15). The jury that had been sworn on March 13 was dismissed.

Appellees moved to dismiss the new charge on double jeopardy grounds. The trial court denied this motion and several others without opinion on May 1, 1975, and set the trial for June 16 (II R. 32). Appellees were tried and convicted (J.S. App. 17).

Immediately after being sentenced, appellees filed an original petition in the Supreme Court of Montana for a writ of *habeas corpus*, contending once more that their trial violated the Double Jeopardy Clause. However, the Supreme Court of Montana had, in the meantime, decided in *State* v. *Cunningham*, 535 P. 2d 186, that jeopardy did not "attach" under state law until the first evidence was received at trial and that this rule for the attachment of jeopardy was consistent with the Double Jeopardy Clause of the Fifth Amendment. Under the *Cunningham* rule, jeopardy had not "attached" when the information was

dismissed in the present case; although the jury had been sworn, no evidence had been received.

The Supreme Court of Montana accordingly denied appellees' application for *habeas corpus* (539 P. 2d 1191; II R. 42-45). It discussed the double jeopardy issue only briefly and stated that it was rejecting appellees' application for four reasons (II R. 42): (1) their legal position was foreclosed by *Cunningham*; (2) *Cunningham* had not been disapproved by the Supreme Court of the United States; (3) no transcript of trial had been prepared, and there was nothing to distinguish the present case from *Cunningham*; and (4) the double jeopardy issue could be raised on appeal in the ordinary course.

After being denied *habeas corpus* relief by the Supreme Court of Montana, appellees filed a petition for *habeas corpus* in the United States District Court for the District of Montana.[2] The district court, agreeing with *Cunningham*, declined to issue the writ (406 F. Supp. 430; J.S. App. 42-53). The district court also held that, even if jeopardy had attached at the time the information was dismissed, there was manifest necessity for the dismissal, and consequently a second trial was permissible (J.S. App. 51-53). The court relied on *Illinois* v. *Somerville*, 410 U.S. 458; it concluded that the typographical error in the information made prosecution impossible and therefore justified the termination of the first trial.

---

[2]Appellees simultaneously pursued an appeal in state court. On October 14, 1976, the Supreme Court of Montana reversed the convictions of appellee Cline and affirmed the convictions of appellee Bretz (*State* v. *Cline*, 555 P. 2d 724). The Court rejected the double jeopardy argument (*id.* at 735), but it concluded that the evidence was insufficient to convict Cline, and it accordingly ordered the charges against him dismissed. Appellee Cline therefore has received in state court all of the relief that the writ of *habeas corpus* could provide, and the federal case is moot with respect to him.

The court of appeals reversed (546 F. 2d 1336; J.S. App. 13-41). It first concluded (J.S. App. 18-32) that the time for the attachment of jeopardy was a federal constitutional question and that attachment could not be postponed by state law. It then held that the dismissal of the information after the first jury had been impaneled was not justified by manifest necessity. The dismissal of Count II was improper, the court held, because that count could have been amended (J.S. App. 36-40); the dismissal of the remaining counts was improper because they were not defective (*id.* at 35-36). Because of these considerations, the court concluded, there was not manifest necessity to terminate the first proceedings, and the second trial was barred by the Double Jeopardy Clause.

DISCUSSION

1. Appellants contend (Br. 6-13) that States may vary the time at which jeopardy "attaches" and that the Montana statute declaring that jeopardy does not attach in a jury trial until evidence is introduced is consistent with the Double Jeopardy Clause of the Fifth Amendment. If the Court should agree with this argument, it would be unnecessary to decide whether it was proper to dismiss the first information; appellees never would have been in jeopardy, and "an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass* v. *United States*, 420 U.S. 377, 393.

We take no position with respect to this contention. In the federal courts jeopardy attaches when the jury is sworn.[3] We do not seek to alter this rule, because defendants may have important interests in the process of

[3]See, *e.g.*, *Serfass* v. *United States*, *supra*, 420 U.S. at 388; *Downum* v. *United States*, 372 U.S. 734.

jury selection itself that are deserving of the constitutional double jeopardy protection.[4]

2. Appellants also present (J.S. 5; Br. 3) the question whether appellees' conviction was proper even if jeopardy attached when the first jury was sworn. They do not argue the question in their brief, however. We believe that the question, which was decided by the court of appeals, is important and is squarely presented by this case. Appellees exhausted their remedies within the Montana courts; their position was doomed unless the Supreme Court of Montana reconsidered *State* v. *Cunningham*,

[4]The process of jury selection may be lengthy and difficult in some cases, or the defendant may have succeeded in obtaining a jury that he believes would be favorable to him. These interests deserve some protection, at least to the extent that there is danger in a particular case of prejudice to the accused from the dismissal of the jury. A rule postponing the attachment of jeopardy would give these interests no constitutional double jeopardy protection, although, on the other hand, abuses might still be prevented by operation of the Due Process Clause or, on a non-constitutional level, simply by the power of the trial court in its sound discretion to refuse unjustified requests to dismiss a jury.

If the Double Jeopardy Clause applies after the empaneling of the jury but before the commencement of evidence (or, as in this case, even before the opening statements of counsel), it does not necessarily follow that the barriers against termination of the trial and subsequent retrial should be as stringent as they would be at later stages of the trial. The rigors for the accused increase as the trial progresses, and so should the reluctance to permit the prosecution to obtain a termination and retrial. Thus, while an unjustifiable request for mistrial, if resisted by the defendant, should not be tolerated even at the earliest stages following attachment of jeopardy (as in *Downum*, *supra*), dismissal of the jury prior to the evidentiary stage of the trial might be countenanced in appropriate cases for reasons less weighty than "manifest necessity." Where the termination occurs immediately after the swearing of the jury, its propriety should perhaps depend upon the degree to which actual prejudice to the accused is likely in the circumstances of the particular case. See Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 512-514 (1977).

535 P. 2d 186, and it had indicated that it was unwilling to do so (see II R. 42).

Appellants seem to contend (Br. 14) that the propriety of dismissing the information is not presented. Because the state courts held that jeopardy had not attached at the first trial, it is true that they never had occasion to decide whether it was proper to terminate that trial. But defendants need not obtain the state courts' opinion on every aspect of a constitutional claim. The duty of defendants is satisfied "once the federal claim has been fairly presented to the state courts" (*Picard* v. *Connor*, 404 U.S. 270, 275).[5] Appellees fairly presented their double jeopardy claim, which was considered and rejected by the Supreme Court of Montana. No more is required.

Although the question whether retrial was proper after the first information had been dismissed (assuming the dismissal came after the attachment of jeopardy) therefore was before the court of appeals, and although appellants state it as a question for this Court (J.S. 5; Br. 3), appellants have not briefed the issues (see Br. 14). Their approach amounts to an abandonment of the question, and we believe that the Court could in this case properly exercise its discretion not to decide an important question that has not been briefed adequately. Compare *I.T.S. Rubber Co.* v. *Essex Rubber Co.*, 272 U.S. 429, 431-432, with *Philbrook* v. *Glodgett*, 421 U.S. 707, 721.

The problems created by the lack of briefing by appellants are compounded by the inadequacy of the record, which does not contain a transcript of the state court proceedings and also lacks many of the pleadings in the state courts. For

[5]See also *Francisco* v. *Gathright*, 419 U.S. 59, 63; *Roberts* v. *LaVallee*, 389 U.S. 40; *Brown* v. *Allen*, 344 U.S. 443, 447-450.

the reasons we discuss below, it may be quite important whether appellees objected to the dismissal of the defective counts of the information and whether they opposed the prosecutor's motion to amend the information. The record is silent on these questions.

If the Court should conclude that the position appellees took in the state court with respect to these questions is important, and if it does not choose to treat the issue as having been abandoned by appellants, then it might be appropriate to vacate the judgment of the court of appeals and remand the case to permit the supplementation of the record. See *Morales* v. *New York*, 396 U.S. 102.

3. We briefly express our views on the retrial question so that the Court, should it decide to reach the question of the propriety of the second trial, will be aware of the considerations indicating that the court of appeals erred in overturning appellees' convictions. Four lines of argument establish the propriety of further proceedings in a case like the present one, and this Court's agreement with any one of them would be sufficient to require reversal of the judgment of the court of appeals.

a. This case is quite similar to *Lee* v. *United States*, No. 76-5187, decided June 13, 1977. In *Lee* the defendant was charged with theft, and he moved after the beginning of his non-jury trial (but before the attachment of jeopardy) to dismiss the information because of a drafting error. The district court took the motion under advisement until it could study the matter, and it proceeded to hear evidence. No one suggested that the information should be amended, although it could have been. After

all of the evidence had been heard, the court dismissed the information because of the defect. Lee then was indicted and retried. This Court held that the Double Jeopardy Clause did not bar the retrial, because the information had been dismissed at the first trial in response to Lee's own motion.

Here, as in *Lee*, the information was dismissed because of a defect that was drawn to the court's attention by the defendants after the start of the trial. Here, as in *Lee*, the trial court dismissed the information in contemplation of a second prosecution on a corrected charge. Here, as in *Lee*, the information could have been amended, but it was not. The only difference between this case and *Lee* that is arguably favorable to appellees is that they moved to "restrict the state's evidence" rather than to dismiss the information. But this motion, in context, was a motion to forbid prosecution altogether and thus to dismiss the information in fact. The technicalities of pleading should not influence the double jeopardy analysis, and the difference between the motion here and the motion in *Lee* is not material.

In this case, as in *Lee* (slip op. 7):

> [T]he only obstacle to a conviction was the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be little doubt that the court granted the motion to dismiss in this case in contemplation of just such a second prosecution. In short, the order entered by the [trial court] was functionally indistinguishable from a declaration of [a] mistrial.

b. It would have been appropriate to terminate the first trial of appellees even if they had objected.[6] In *Illinois* v. *Somerville*, 410 U.S. 458, this Court held that a mistrial could be declared over a defendant's objection when a technical defect in the indictment prevented successful prosecution. In *Somerville*, as in this case, the defect was discovered and the prosecution was terminated after the jury had been sworn but before any evidence had been received. And although the present case involves the dismissal of counts of the information rather than the declaration of a mistrial, "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge * * * had labeled his action a 'dismissal' rather than a mistrial." *Lee*, *supra*, slip op. 7-8 n. 9.

The court of appeals concluded (J.S. App. 39-40) that *Somerville* did not support the constitutionality of a second trial of appellees because in this case state law would have permitted the correction of the technical defect by amendment of the information. Rev. Codes of Montana § 95-1505(b) (1969 Repl.) provides that a "court may permit any charge to be amended as to form at any time before verdict" if the defendant is not prejudiced; the court of appeals concluded (J. S. App. 40) that "[o]ne can hardly imagine a more 'formal' matter than the correction of a glaring typographical error, and surely no 'rights of the defendant' would have been undercut by the requested alteration.[7]

---

[6]The record does not disclose whether appellees objected to the termination on Count II. See page 9, *supra*. Appellees' petitions for *habeas corpus* do not assert that there was any objection (see A. 16-20), and an objection would have been inconsistent with appellees' previous motions to restrict the prosecution's proof.

[7]The typographical error in the information was "formal," but as a consequence the first proceedings did not involve a charge that appellees committed in 1973 the crime charged in Count II. This

The court of appeals' analysis overlooks the fact that appellees sought to capitalize upon the typographical error by restricting the prosecution's proof. They did not want the information to be amended, and they may have opposed the prosecutor's motion to amend.[8] We submit that, in analyzing whether termination of a trial was manifestly necessary, any alternative course of action objected to by the defendant should be treated as if it did not exist. Cf. *Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 14 (plurality opinion) ("although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election"). If appellees resisted the trial court's option to permit Count II to be amended, they should not now be heard to contend that the trial court should have allowed the amendment despite their opposition and thereby avoided the need for a second trial. If they exercised their control over the course of the proceedings to prevent the correction of the formal error, then appellees

---

gives rise to the argument, initially made by appellees themselves, that they were not charged with or in jeopardy of conviction concerning any 1973 activity. The second information therefore would not, under this analysis, state the "same offense" as the original Count II, and the basis for appellees' double jeopardy argument would disappear. It would not be consistent for appellees, who argued at the first trial that the information did not charge a 1973 crime, now to argue that they were in jeopardy on the charge that was stated by Count II of the second information.

[8]See page 9, *supra*.

are themselves responsible for the creation of the "manifest necessity" to terminate further proceedings and dismiss the jury.[9]

c. Appellees also exercised considerable control over the course of the proceedings by the timing of their motions. Although they apparently knew about the typographical error in advance of trial, appellees waited until the jury had been sworn before they moved to capitalize upon the defect.[10] In other words, they subjected themselves to a seemingly unnecessary first jeopardy for the purpose of invoking the Double Jeopardy Clause to defeat

---

[9]We doubt, moreover, that either the prosecutor or the court had an obligation to suggest the amendment of the information. Since the right to proceed with a trial that has begun is the defendant's valued right, the obligation to suggest options that would preserve the continuity of proceedings should also rest primarily upon the defendant. In *Lee*, for example, the Court did not think that it was material that the prosecutor could have suggested an amendment to the information but did not do so. If the obligation to suggest and implement means of proceeding with the trial rests upon the court, then it would often be to a defendant's advantage to stand mute even when he knew of a way to avoid an unnecessary termination, since muteness could produce complete immunity from prosecution. A court "[should] not construe the double jeopardy clause so as to permit a defendant who is ready to sacrifice his interest in reaching an existing jury in exchange for a dismissal on double jeopardy grounds to obviate the need for his reaching any jury at all. Such a defendant might be all too willing to sit by silently and refrain from bringing to the trial court's attention alternative solutions. * * * [R]equiring the defendant to assert his right to have his guilt decided by the existing jury will assure that a subsequent double jeopardy dismissal in fact does serve to vindicate the right asserted. * * * Protecting a defendant's interests * * * would be much less a matter of navigating 'a narrow compass between Scylla and Charybdis'. [*Gori* v. *United States*, 367 U.S. 364, 369], if the defendant could be relied upon, and indeed required, to participate in the determination." *United States* v. *Grasso*, 552 F. 2d 46, 56 (C.A. 2) (Timbers, J., dissenting), petn. for a writ of certiorari pending, No. 76-1543.

[10]We do not suggest that counsel had a subjective motivation to manipulate the jeopardy rules, and in our view subjective motivation is irrelevant. For the reasons discussed in the text it is enough that the formal defect in the proceedings could have been, but was not, raised before trial.

any determination of guilt or innocence on the merits. We submit that the Double Jeopardy Clause does not bar dismissal and retrial in such circumstances. See *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.

Appellees could and should have drawn the defect to the attention of the court before trial, as Montana law permits and may even require. Rev. Codes of Montana § 95-1702 (1969 Repl.). Pretrial resolution of objections to an indictment or information averts any double jeopardy problem and in most cases any need for two trials. See generally *Serfass* v. *United States*, *supra*.

A defendant who is offered an opportunity to obtain a ruling before trial on legal objections to the prosecution, and who neglects that opportunity, has for all practical purposes surrendered any double jeopardy objection to further proceedings. It is not unfair to hold appellees to this standard in the present case, because they had an ample opportunity to obtain a decision before trial. Cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977.

Whether the making of a belated objection is viewed as a relinquishment of a double jeopardy claim or, perhaps, as a consent to the belated termination of proceedings, a defendant should not be allowed to capitalize upon the rules for the attachment of jeopardy in order to obtain a tactical advantage. There is no reason why a clever defendant should be allowed to transmute a drafting error into immunity from prosecution merely by delay in calling the error to the court's attention. One commentator has expressed the matter well (Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 Colum. J. L. & Soc. Probs. 295, 343-344 (1976)):

> When jeopardy attaches only as a result of the defendant's delay, jeopardy could have been completely avoided had the defendant moved to dismiss at the proper time. It [is] thus the defendant who 'effectively (and unnecessarily)' placed himself in jeopardy * * *. * * * [T]he subsequent trial is in effect the * * * only one that the defendant would have undergone, but for his own deliberate choice of dilatory tactics. * * *
>
> The gravamen of this approach is the defendant's voluntary assumption of jeopardy in the proceedings leading to dismissal. * * * The double jeopardy clause's ban on retrials is designed as a brake on state power and as a curb on the number of times the state, with all its resources, can present its proofs in an attempt to convict. It is designed to curb prosecutions at the Government's behest, not prosecutions which, for tactical reasons, the defendant voluntarily chose to undergo and which the defendant could legitimately and easily have avoided. * * * [W]here the defendant allows himself to be placed in jeopardy in order to cut short the prosecution, the Government [should] have one chance at a complete trial * * * .

No legitimate interest of the accused is served by allowing him to accept an unnecessary attachment of jeopardy only to seek to abort the trial. This is particularly true where the prosecution is cut short before any evidence has been introduced. When the prosecution is ended at such an early stage, few of the evils associated with reprosecution can occur. The defendant is not required to sit through two trials; he is not exposed to double expense and discomfiture; the prosecution has not had a dress rehearsal of its case or a preview of

the defense evidence, nor does it enjoy two opportunities to convict, or to do better with a second factfinder after failing with the first; there is little or no potential for manipulation or harassment. In such circumstances retrials should be allowed freely. See *United States* v. *Gentile*, 525 F. 2d 252, 256 n. 2 (C.A. 2), certiorari denied, 425 U.S. 903; Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 507-508, 514-517, 520-521 (1977).

d. This Court concluded in *United States* v. *Dinitz*, 424 U.S. 600, 609, that when a trial is aborted before verdict "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed" in the event of apparent error. In *Dinitz* the Court found that a second trial was permissible because the defendant had exercised his control over the proceedings by requesting a mistrial.

A defendant may exercise control over the course of proceedings both by what he does and by what he does not do. In *Lee*, for example, the defendant exercised both sorts of control: first he requested the dismissal of the indictment, and then, after evidence had been heard at trial, he did not withdraw his request or ask the judge to make a formal finding of guilt or innocence before ruling on his motion to dismiss (*Lee*, *supra*, slip op. 8, 10-11). The Court explained that the trial court in *Lee* had acted reasonably in light of "the last-minute timing of the motion and the failure of counsel to request a continuance" or otherwise object to the dismissal of the information after the hearing of evidence (slip op. 11).

Appellees, too, exercised control both by what they did and by what they did not do. They moved to restrict the proof on Count II of the original information, and

they thus set in motion the events that terminated the trial. They induced the state court to halt proceedings, send the jurors home, and receive briefs on the numerous motions filed immediately after the jury was sworn. Whether or not these actions amounted to a request for or a consent to the termination of the trial—a matter we have discussed at pages 9-16, *supra*—we believe that appellees had an obligation to inform the court if they objected to a termination of proceedings on Count II.

After all, the valued right to receive the verdict of the factfinder at the first trial—the most important double jeopardy interest at stake in cases like the present one—is the defendant's right. Some defendants, like the defendant in *Somerville*, will assert their desire to continue with the trial; others, like the defendant in *Lee*, will be content with a termination; still others, like the defendant in *Dinitz*, unquestionably will prefer a prompt termination to any other option. In an adversary system of criminal justice, the defendant should have some obligation to inform the court whether he desires to proceed with the trial or whether, instead, he is content with a termination when one has been requested by the prosecutor or proposed by the court. At least when the defendant himself is responsible for setting in motion the events that lead to a mid-trial termination, a failure explicitly to object to that termination should be treated as consent.[11]

---

[11]Most courts of appeals have held that, unless the trial court acts so precipitously that the defendant does not have time to decide whether to object, silence in the face of a declaration of a mistrial must be taken as consent. See, *e.g.*, *United States* v. *Gordy*, 526 F. 2d 631, 635 n. 1 (C.A. 5); *United States* v. *Phillips*, 431 F. 2d 949 (C.A. 3); *Roberts* v. *United States*, 477 F. 2d 544,

Nothing in the record of this case indicates that appellees objected to the dismissal of Count II. Because the record does not include a transcript of the state court proceedings, however, it is not possible to say with certainty that they did not object (see page 9, *supra*). We therefore believe that, if the Court should agree with us that the presence or absence of an objection may be controlling, it should vacate the judgment of the court of appeals and remand for further proceedings.

4. The arguments we have made above address the propriety of a trial on Count II of the second information, which corrected the typographical error in the original Count II. The court of appeals also held (J.S. App. 35-36) that the trial on Count I of the second information was improper because it replaced counts that were not defective. The court of appeals held that the trial on the sufficient counts should have proceeded, reasoning that there was no manifest necessity for its termination as to those counts.

As a general rule, a defendant has a substantial interest in proceeding to verdict once jeopardy has attached. But, in determining whether appellees were properly deprived of that interest in this case, the court of appeals did not give adequate attention to the circumstances under which the sufficient counts were dismissed. They were dismissed primarily in order to ensure that appellees would be subjected to only one trial for

---

545-546 (C.A. 8); *United States* v. *Pappas*, 445 F. 2d 1194, 1199-1200 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355-356 (C.A. D.C.); but see *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860. (The discussion in *Himmelfarb* is *dictum;* moreover, it relies upon a view of the role of formal "waiver" in assenting to a mistrial that this Court rejected in *Dinitz*.)

their course of criminal conduct. Count II already had been dismissed as a result of proceedings for which appellees bore much responsibility. Once Count II had been dismissed, it was desirable to dismiss the sufficient counts to vindicate the interest of the public in holding only one trial (with its expense and inconvenience for witnesses) and the interest of appellees in being exposed to only one trial.

All of the counts dealt with crimes committed during a single alleged course of criminal conduct, and a joint trial was therefore appropriate.[12] Unless the technically sufficient counts had been dismissed, there would have been a need to hold two evidentiary hearings rather than one. By dismissing all of the counts, the state court prevented this; appellees were exposed to only a single full trial. The court of appeals' approach would have required the holding of two full trials, and we do not understand why the Double Jeopardy Clause, which was intended to guard against multiple trials, should be interpreted in these circumstances to require multiple trials of defendants who never indicated a desire for such a course of action.[13]

---

[12]At least two Justices would require the prosecution to ensure that all crimes arising out of one course of conduct are tried in a single proceeding. See *Ashe* v. *Swenson*, 397 U.S. 436, 453-454 (Brennan, J., concurring); *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977 (Brennan, J., concurring). The order dismissing the sufficient counts allowed the filing of a new information and the consolidation in a single trial of all of the pertinent charges.

[13]In *Jeffers* v. *United States*, *supra*, four Justices concluded that the federal courts should ensure that only a single trial is held on charges involving a greater and a lesser offense even if the accused resists a joint trial. See dissenting slip op. 1-3. The dismissal of the sufficient counts here enabled appellees to be tried in but a single proceeding. Whether the court could properly have overridden an objection by appellees to dismissing the information in order to hold a single trial (cf. slip op. 1 n. 3) need not be considered, since the record does not indicate whether appellees objected to the dismissal of the sufficient counts.

CONCLUSION

The United States takes no position with respect to the time of attachment of jeopardy in this case. If the Court accepts appellants' arguments concerning the attachment of jeopardy, it should reverse the judgment of the court of appeals. If it rejects these arguments, and in addition concludes that appellants have abandoned their position concerning the propriety of a second trial, then it should affirm the judgment of the court of appeals without considering the arguments presented in this memorandum. If it concludes that these arguments are open, however, then it either should reverse the judgment of the court of appeals for the reasons we have discussed or vacate the judgment of that court and remand for supplementation of the record.[14]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JULY 1977.

---

[14]In any event, the case has become moot with respect to appellee Cline (see note 2, *supra*); the judgment should be vacated with respect to him and the case should be remanded with instructions to dismiss. See *Weinstein* v. *Bradford*, 423 U.S. 147.

DOJ-1977-07